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No. 01-

IN THE

Supreme Court of the United States

TOPEKA STATE HOSPITAL AND
THE STATE OF KANSAS,

Petitioners,

v.

CYNTHIA TURNBULL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. Can an employer be subjected to liability under Title VII for failing to prevent a criminal assault by a non-employee upon proof of merely a lack of ordinary care, or should the higher burden of proof required under similar civil rights statutes apply?

2. Does Title VII provide a federal tort remedy for bodily injury suffered by a State employee during the course of employment in the absence of intentional discrimination?

3. If, in light of questions 1 and 2, liability may be imposed under Title VII premised upon mere negligence does such liability, when applied to States, impermissibly infringe upon the sovereignty of the several States as preserved by the Tenth and Eleventh Amendments to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

The State of Kansas and the Topeka State Hospital respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. *infra* 1a-11a) is reported at 255 F.3d 1238. The judgment of the district court, announced in open court after finding the jury had deadlocked (App. *infra* 14a), is not reported nor was an opinion filed.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 2001. (App., *infra*, 1a.) The petition for rehearing was denied on August 10, 2001. (App., *infra*, 12a.) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

As the constitutionality of Title VII, as applied by the court below, may be called into question herein, Petitioner has served, contemporaneously with the filing of this petition, a copy of this petition upon Solicitor General of the United States pursuant to 28 U. S. C. § 2403(a). The court below did not address the constitutionality of its construction of Title VII and, thus, that court has not certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 703(a) of Title VII provides, in relevant part:

> it shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

> conditions, or privileges of employment, because of such individual's ... sex.

42 U.S.C. § 2000e-2(a)(1).

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Fourteenth Amendment provides, in relevant part:

> Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ....
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV.

STATEMENT

This case confronts the Court with the need to determine the scope of Title VII as applied to bodily injury cases

involving merely negligent conduct by an employer in failing to anticipate and prevent a criminal assault upon an employee by a non-employee.

Topeka State Hospital (TSH) was a state-run inpatient mental health center which treated patients with severe mental illnesses for whom outpatient treatment options had failed. The hospital closed in 1997. All patients admitted to TSH posed some danger to themselves or others. TSH was not a jail and patients were treated in the least restrictive environment possible. THS was obliged to admit any patient referred to the hospital, but violent offenders could unusually be transferred to more secure facilities.

Cynthia Turnbull, Ph.D., a psychologist, became employed at TSH in 1993. Dr. Turnbull was hired to start a group therapy program for the adolescent treatment unit and to conduct individual and group therapy with adolescent male inpatients. One treatment issue that arose regularly was the "sexual acting out" displayed by many of the patients. TSH staff were aware this "acting out" posed potential dangers, as was demonstrated when a female employee was murdered by a patient in 1992. The hospital purchased personal alarms known as "screechers" after the 1992 murder, but they had fallen out of use by the time Dr. Turnbull started work and she did not know of their availability. Dr. Turnbull nonetheless recognized the risks of her job, and she regularly reviewed and signed a job description which included a specific mention of the risk of assault by patients.

The hospital generally approached sexual acting out by patients as a clinical issue to be addressed in the patient's treatment program devised by the patient's treatment team. Employees were provided sexual harassment training, but that training did not address conduct by patients.

Female staff at the hospital often felt unsafe. Though the hospital had several policies directed at the safety of staff

members, Dr. Turnbull and others complained these measures were not always effective. Dr. Turnbull comunicated her safety concerns during an Executive Committee meeting in 1995, though those concerns are not reflected in the meeting minutes. The Executive Committee noted in 1996 that another group of staff was expressing fear arising from the safety conditions on the ward.

Other than her testimony to the Executive Committee, Dr. Turnbull made no formal reports of her safety concerns, but had several conversations about safety with her supervisors in the psychology department.

The adolescent had limited treatment facilities. The adolescent unit had no treatment rooms, and the treatment room with a one-way mirror for visual monitoring was in the psychology department in a separate building. During renovations undertaken prior to the decision to close the hospital, Dr. Turnbull requested that the hospital construct a treatment room on the adolescent unit with a large window to provide a safer place to conduct therapy. Such a room was not included in the renovation.

Dr. Turnbull met with female patients and smaller male patients in her office, but preferred not to do so when meeting with larger male patients. The options within the unit were public spaces that provided little protection for confidential conversation, and seclusion rooms furnished with only a mattress on the floor. In pleasant weather, Dr. Turnbull and the other psychologists frequently walked with patients around the hospital grounds as they spoke.

James Stout was admitted to the adolescent unit at TSH in June 1996. Stout was alleged to have assaulted two female staff members at another state hospital prior to his transfer, but that fact was not communicated to TSH. The record does not confirm whether these assaults actually occurred or, if they did, their nature.

Stout's diagnosis on admission was "oppositional defiant disorder," a relatively mild diagnosis for a psychiatric inpatient but one characterized by a tendency toward aggression and difficulty submitting to authority. Dr. Turnbull performed his intake evaluation and noted he had trouble respecting personal boundaries when agitated. Dr. Turnbull did not believe his reports of past rapes and of voices telling him to "kiss" and "feel" somebody. She nonetheless noted in his file that staff should not meet him alone in small, enclosed areas. Dr. Turnbull thereafter continued as part of Stout's treatment team and as his treating psychologist.

Despite Stout's reports to Dr. Turnbull and one period when Mr. Stout was restrained for aggression, his therapy proceeded well, and by August he was allowed the privilege of field trips off the hospital grounds. Stout had several therapy sessions with Dr. Turnbull and was never sexually inappropriate toward her. On August 26, the weather was fine and many people were outside enjoying the day. Dr. Turnbull and Stout headed outside to walk the grounds during their therapy session. When they reached a slightly secluded area, Stout attacked Dr. Turnbull, knocking her to the ground, undressing her and digitally penetrating her, biting and choking her, and repeatedly threatening to kill her. Dr. Turnbull never returned to the hospital following the assault.

The TSH Security Building was next to the adolescent building. Dr. Turnbull did not notify security that she was taking Stout on a walk upon the grounds. Dr. Turnbull did not request that security escort her during her walk, though such was available had she asked. In response to Stout's assault, he was removed from TSH, charged criminally and convicted, never to return to TSH. (App. *infra*, 15a.)

Dr. Turnbull sued TSH and the State of Kansas under Title VII for allowing a sexually hostile work environment to exist at the hospital. During a trial which included nearly seven

days of evidence, TSH made a Rule 50 motion for judgment as a matter of law at the close of plaintiff's evidence and again at the close of all evidence, and argued Dr. Turnbull had not proven a legally sufficient hostile work environment claim. The trial court took each motion under advisement, and the jury began its deliberations.

The jury was asked to determine two issues: whether a sexually hostile work environment existed at TSH and, if so, whether the hospital or state should be held legally responsible. After two half-days of deliberation, the jury reported it was unable to reach a unanimous decision on the second question and felt further deliberation would be fruitless. The trial court revisited the Rule 50 motions and held the evidence had not shown a cognizable claim of gender based sexual harassment and dismissed the case. (App. *infra* 14a.) The trial court then entered judgement for TSH and the State of Kansas. (App. *infra* 13a.)

Dr. Turnbull appealed to the United States Court of Appeals for the Tenth Circuit which reversed. As the harassment at issue was perpetrated by a nonemployee, the Court of Appeals applied what it deemed a negligence analysis, asking whether TSH "fail[ed] to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." (App. *infra* 9a.)

The appeals court noted that, despite the fact Dr. Turnbull had expressed no particular concern about James Stout, the complaints by Dr. Turnbull and others to the Executive Committee about generalized safety concerns, and Dr. Turnbull's conversations with her supervisors regarding "sexual acting out" by other patients, and generalized testimony of a atmosphere of sexual hostility by patients at the hospital was pervasive. From this, the Court of Appeals reasoned: "A reasonable juror could conclude that TSH had

either actual or constructive knowledge of the risk of sexual assault by patients." (App. *infra* 9a.)

The appeals court then concluded that a jury would be justified in finding the measures taken by TSH to ensure the safety of its staff were inadequate. The court noted Dr. Turnbull's contentions that the hospital could and should have done more. The court stated: "More staff would have made the wards safer, as would treatment rooms in visible areas. The hospital could have provided self-defense training and better informed staff how to respond if sexually harassed by a patient. Although screechers were technically available, TSH could have ensured they were given to each staff member and kept in working order." (App. *infra* 11a.)

As the jury had divided on the issue of TSH's liability, the court concluded that a reasonable juror could believe the hospital's preventative measures were inadequate. Thus, the court held Dr. Turnbull had presented sufficient evidence to support a claim of sexually hostile work environment against TSH and held that the grant of judgment for TSH as a matter of law was improper.

REASONS FOR GRANTING THE PETITION

The court of appeals improperly applied Title VII to create a federal remedy for bodily injury to an employee which has heretofore been the exclusive subject of state tort and workers compensation laws. The court of appeals applied a simple negligence standard to impose liability upon one of the several States under Title VII. Title VII itself does not extend so far as to permit the imposition of liability upon any employer for a single incident sexual assault by a non-employee third party. The negligence standard used by the court below conflicts with this Court's decisions under Title IX and the Fourteenth Amendment which require proof deliberate indifference, a much higher degree of culpability.

Moreover, Congress does not possess the constitutional power to impose liability upon the States in the absence of intentional discrimination which violates § 1 of the Fourteenth Amendment. The Eleventh Amendment bars the imposition of liability in the absence of intentional discrimination. Further, the rationale provided by the Tenth Circuit supporting a finding of negligence encroaches upon the day to day operation and budgeting for a State agency and impermissibly infringes upon the rights reserved to the States under the Tenth Amendment.

This Court has not ruled that liability may be imposed under Title VII for conduct by nonemployees based upon mere negligence and absent actual knowledge of such harassment. Those cases which recognize and permit a claim of sexual harassment based upon a sexual assault by a non-employee purport to do so on a negligence standard. *See, e.g., Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998); *Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997). The Tenth Circuit erroneously relied upon these cases as well as 29 C.F.R. § 1604.11(e)[1] as support for a negligence standard which imposes liability for the failure to "remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known."

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[1] 29 C.F.R. § 1604.11(e) provides that, "[a]n employer may ... be responsible for the acts of nonemployees, with regard to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action."

As noted by Justice Thomas in *Faragher v. City of Boca Raton*, 524 U.S. 775, 811, the EEOC has no substantive rulemaking authority under Title VII, and it is thus inaccurate to refer to § 1604.11 it as a regulation or to give it authoritive weight, and cannot establish negligence per se. *Id.* at 811 (Thomas, J., dissenting).

The *Lockard* and *Crist* cases, while paying lip service to the "should have known" standard articulated in § 1604.11(e), were cases in which the defendant employers had actual knowledge of ongoing harassment of the employees. In *Crist*, the employee after she and others had complained of harassment by a nursing home resident was instructed to subject herself to further harassment to permit the empoyer to observe the conduct. The employee refused and quit. In *Lockard*, the plaintiff had notified her employer that specific customers were harassing her and asked repeatedly that another person serve the customers. The plaintiff was instructed to continue serving the harassing customers and was then assaulted. *Lockard*, 162 F.3d at 1067.

The *Lockard* and *Crist* cases involved actual knowledge of ongoing harassment by specific, identified persons. Here, there was no ongoing harassment by Stout nor had Dr. Turnbull voiced any concerns or complaints regarding Stout. Notwithstanding this lack of complaints concerning Stout, the Tenth Circuit held that TSH had actual or constructive knowledge of the risk of a sexual assault which occurred on August 26, 1996.

The decision below is contrary to this Court's decision in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), in which it was held that harassment by a nonemployee was actionable under Title IX only upon a showing of "deliberate indifference to known acts of harassment." *Id.* at 633. Furthermore, when amending Title VII in 1991, Congress reiterated its intent to redress intentional discrimination. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072 (1991) (the purpose of the 1991 Act was to "amend the Civil Rights Act of 1964 ... to provide for damages in cases of intentional employment discrimination.")

In the case at bar, the Tenth Circuit improperly intermingled the diffuse evidence of generalized concerns of

employee safety and "sexual acting out" by other patients with plaintiff's claim which involves a single incident of sexual assault by James Stout. Dr. Turnbull herself did not believe Stout presented a danger to herself. TSH, a state psychiatric hospital, was an inherently dangerous working environment given the nature of the patients the hospital was obliged to admit and treat.

The court of appeals' negligence standard, focusing on whether the employer took "reasonable measures to make the workplace as safe as possible", is a self proving path to strict liability. The court of appeals ignored the lack of notice to TSH that Stout presented a particular risk of sexual assault to Dr. Turnbull or any other employee.

The assailant in this case was a patient in the care, custody, and control of the state hospital. The very nature of the custodial relationship enables a hospital to take measures to prevent a patient from committing an assault. Straight jackets, seclusion rooms, medications such as thorazine, and leather restraints are all measures which could well have prevented the assault by James Stout. When the Tenth Circuit focused only on whether measures were available to make Dr. Turnbull's workplace safer, the court ignored the paramount inquiry of whether TSH had knew that this particular patient presented such a risk so as to warrant extreme preventive measures.

Imposition of liability under Title VII for the failure to take extreme preventive measures infringes upon the patient's liberty interest arising under the Fourteenth Amendment to freedom from bodily restraint as recognized in *Youngberg v. Romeo*, 457 U.S. 307 (1982). In *Youngberg*, *id.* at 316, this Court recognized that an individual who is involuntarily committed to a psychiatric institution retains a liberty interest in freedom from bodily restraint. Hence, Dr. Turnbull's rights under Title VII, if any, must be balanced against of the

constitutional liberty interest of the hospital's patients in freedom from the very restraints which might prevent physical assaults.

Imposition of liability under Title VII for mere negligence exceeds the scope of the statute itself which addresses intentional discrimination and was not intended to supplant state tort law. This Court has recognized that common law principles are not wholly incorporated into Title VII. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 802, n.3 (1998) (noting that Court must "adapt agency concepts to the practical objectives of Title VII") (quoting *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) ("common-law principles may not be transferable in all their particulars to Title VII")); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). The common law principles applicable to Title VII address principles of agency, which are the express standards set by Congress to determine the vicarious liability of employers for acts of supervisory employees. 524 U.S. at 802. Agency principles do not apply herein as the assault was perpetrated by a non-employee. The standards enunciated by this Court in such instances require a deliberate indifference to known acts of harassment which did not exist in this case.

If Title VII were construed to extend to purely unintentional, negligent conduct, such a construction would violate the Tenth and Eleventh Amendments[2] proscribing the

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[2] The briefs below were directed to how the facts did not meet even the negligence standard for Title VII liability. The jurisdictional bar of Eleventh Amendment Immunity can properly be raised for the first time before this Court. *Ford Motor Co. v. Dep't of the Treasury*, 323 U.S. 459, 467-68 (1944); *Edelman v. Jordan*, 415 U.S. 652, 677-78 (1974).

powers of the Congress and reserving the sovereignty of the States.[3]

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . ." U.S. Const. amend. XI. This Court interpreted this Amendment it to apply to law suits brought against a State by citizens of that State. See ***Kimel v. Florida Bd. of Regents***, 528 U.S. 62, 72-73 (2000); and ***Seminole Tribe of Fla. v. Florida***, 517 U.S. 44, 54 (1996). The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued in federal court by private individuals. See ***Kimel***, 528 U.S. at 73.[4]

This Court has drawn a distinction of constitutional proportion between negligent and intentional misconduct. ***Daniels v. Williams***, 474 U.S. 327 (1986). This Court has

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[3] Petitioner does not herein challenge Congress' power, under § 5 of the Fourteenth Amendment to enact legislation prohibiting intentional discrimination on the basis of gender or race. Indeed, this Court held in ***Fitzpatrick v. Bitzer***, 427 U.S. 445 (1976), that the Congress had acted pursuent to § 5 of the Fourteenth Amendment to subject states to suits for damages in federal court. ***Fitzpatrick*** addressed a pension plan which discriminated against males. Though this holding has been called in to question by this Court's recent line of cases addressing the Eleventh Amendment, the Congress' power to apply Title VII's prohibition against intentional discrimination to the states need not be addressed herein.

Petitioner herein challenges a construction of Title VII which would extend the its scope beyond the reach of § 1 of the Fourteenth Amendment to seek to redress unintentional negligence, thereby supplanting state tort and workers' compensation laws.

[4] The Kansas Supreme Court recently held that only the Kansas legislature can waive the State's sovereign immunity and that a waiver cannot be based on acts of agents. ***Connelly v. State Highway Patrol***, 26 P.3d 1246, 1259 (Kan. 2001).

made clear, when addressing claims under the Due Process Clause of the Fourteenth Amendment, that mere negligence is insufficient to implicate the rights protected by the Fourteenth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998) (citing *Paul v. Davis*, 424 U.S. 693, 701 (1976); and *Daniels v. Williams*, 474 U.S. at 332). In *Board of Trustees of The University of Alabama v. Garrett*, 531 U.S. 356, 121 S. Ct. 955, 966 (2001), this Court stated: "Although disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." (Internal citation omitted.) *See also DeShaney v. Winnebago County*, 489 U.S. 189, 197 (1989) ("a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.")

This Court adhered to the distinction between negligence and intentional misconduct in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), in which this Court held that liability under Title IX for harassment by a nonemployee could exist only upon a showing of "deliberate indifference to known acts of harassment." *Id.* at 633.

Congress, though empowered to enforce the Fourteenth Amendment, does not possess the power "'to determine what constitutes a constitutional violation.'" *Kimel*, 528 U.S. at 81 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)). The Court, not Congress, defines the substance of constitutional guarantees. *Garrett*, 121 S. Ct. at 963. Congress can enact legislation to remedy or prevent conduct that violates the Fourteenth Amendment, but Congress cannot redefine or expand the substance of the Fourteenth Amendment itself. This Court requires a "'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Kimel*, 528 U.S. at 81 (quoting *City of Boerne*, 521 U.S. at 520). Congress must

carefully tailor its legislation so that it enforces the Fourteenth Amendment without altering the Amendment's meaning.

The "congruence and proportionality" test requires examination of the scope of the statute to determine whether it is consistent and compatible with the Fourteenth Amendment, or whether it expands the Amendment by prohibiting more State action than would be unconstitutional. *City of Boerne*, 521 U.S. at 532; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 646-47 (1999); *Kimel*, 528 U.S. at 86. The Court has also considered whether Congress identified in the legislative record a pattern of unconstitutional conduct by the States (that was targeted by the statute at issue) in order to determine whether the statute is a proportional response to unconstitutional State action. *City of Boerne*, 521 U.S. at 530; *Florida Prepaid*, 527 U.S at 640; *see also Kimel*, 528 U.S. at 88; *Garrett*, 121 S. Ct. at 964.

In four recent cases, the Supreme Court has held that Congress exceeded its § 5 enforcement powers. In each case, the Court found that the statute in question prohibited substantially more State action than would be unconstitutional. *See City of Boerne*, 521 U.S. at 532-34 (the restrictions of the Religious Freedom Restoration Act ("RFRA") far exceed any pattern or practice of unconstitutional conduct by the States under the Free Exercise Clause); *Florida Prepaid*, 527 U.S at 646-47 (under the Patent Remedy Act, an unlimited range of State conduct would expose a State to claims of patent infringement); *Kimel*, 528 U.S. at 86 (the Age Discrimination in Employment Act ("ADEA") prohibits substantially more state employment decisions and practices than would likely be held unconstitutional); *Garrett*, 121 S. Ct. at 967 (the Americans with Disabilities Act ("ADA") imposes restrictions that far exceed those of the Fourteenth Amendment's Equal Protection Clause). The Court also concluded in each case

that Congress had not identified in the legislative record a pattern of unconstitutional conduct by the States that was targeted by the statutes. *See City of Boerne*, 521 U.S. at 530 (RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry); *Florida Prepaid*, 527 U.S. at 640 ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."); *Kimel*, 528 U.S. at 89 ([In enacting the ADEA], "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation."); *Garrett*, 121 S. Ct. at 966 ("Congress' failure to mention States in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.").

The Fourteenth Amendment prohibits intentional discrimination or disparate treatment on the basis of race or gender by states unless they satisfy a difficult burden, *see Washington v. Davis*, 426 U.S. 229, 239 (1976) (race); *United States v. Morrison*, 529 U.S. 598 (2000) (gender). Title VII itself prohibits intentional discrimination. See 42 U.S.C. § 2000e-2(a). The application of Title VII by the Tenth Circuit herein discarded the constitutional requisite of intentional discrimination and looked only for negligent conduct. This is an illogical extension of the text of Title VII and a departure from this Court's clear guidance in cases decided under Title IX and directly under the Fourteenth Amendment. This Court has announced on many occasions

that mere negligence does not meet the threshold of a constitutional violation.[5]

The formula adopted by the Tenth Circuit expands Title VII far beyond the its intended scope of redressing intentional discrimination. As such, the construction given to Title VII below is neither congruent nor proportional with the injury sought to be remedied by Title VII (intentional discrimination by employers and their agents). The decision below effectively turns Title VII into a federal cause of action which supplants state tort law and workers' compensation laws.

In *Printz v. United States*, 521 U.S. 898 (1997), the this Court invalidated, under the Tenth Amendment, a provision of federal law requiring state and local law enforcement officers to conduct background checks on prospective handgun purchasers. The *Printz* Court stated:

> We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Id. at 935.

Similarly, Congress cannot conscript State agencies and their budgets under Title VII to obviate all possible acts of violence against women. This Court held in *United States v. Morrison*, 529 U.S. 598 (2000), that Congress lacked the

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[5] *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989) (deliberate indifference required to show claim of inadequate training); *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (mere negligence on the part of a state actor does not constitute a deprivation of due process under the Constitution).

power to enact a civil remedy for violence against women when that remedy was at least directed to the perpetrator. The decision below seeks instead to create a remedy against an employer for crimes perpetrated by non-employees.

Under the formula applied below, the State of Kansas could be held liable, under Title VII, for a sexual assault of an employee walking to her car in a darkened parking lot. The decision below holds the State strictly liable based on the simple foreseeability of a criminal act.

The decision below grafts a new federal remedy upon Title VII for conduct which is clearly not intentional discrimination. Liability is imposed for mere negligence in failing to anticipate and prevent a crime. Liability under such circumstances deviates from the clear guidance provided by this Court and expands the scope of Title VII beyond its constitutionally permissible reach.

CONCLUSION

The decision below improperly expands Title VII liability to encompass merely negligent conduct. In so doing, the Tenth Circuit ignores this Court's precedent under Title IX and the Fourteenth Amendment and throws open the federal courthouse door to a class of actions which have traditionally and appropriately been the exclusive province of state law governing negligence and workers compensation.

The Tenth Circuit's application of Title VII liability upon a State for merely negligent conduct gives a construction to Title VII which clearly exceeds Congress' constitutional authority to legislatively remedy intentional discrimination under the Fourteenth Amendment.

The petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

PUBLISH

FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
JUL 5 2001
PATRICK FISHER
CLERK

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CYNTHIA TURNBULL,

Plaintiff-Appellant,

v. No. 00-3086

TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 98-CV-2222-GTV)

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Before **TACHA,** Chief Judge, **SEYMOUR** and **BRORBY,** Circuit Judges.

SEYMOUR, Circuit Judge.

Plaintiff/Appellant Cynthia Turnbull, a psychologist at the Topeka State Hospital (TSH) in Kansas, sued her employer and the state for sexual harassment after she was sexually assaulted by a patient. The jury found a sexually hostile work environment existed at TSH, but it split over whether TSH should be held legally responsible for that environment. After learning of the jury's inability to decide, the district court granted an earlier defense motion for judgment as a matter of law. The sole issue on appeal is whether that ruling was proper. We hold that it was not, and remand the case for further proceedings.

I

We review de novo a grant of judgment as a matter of law. *Phillips v. Hillcrest Med. Ctr.*, 244 F.3d 790, 796 (10th Cir. 2001). Rule 50 of the Federal Rules of Civil Procedure authorizes a trial judge to grant judgment as a matter of law "if, after a party has been fully heard on an issue, there is no legally sufficient evidentiary basis for a reasonable jury to find for the party . . . ." *Id.* Because a court does not lightly presume the decision of a reasonable juror, judgment "may be granted only if the evidence points but one way and is susceptible to no reasonable inference which may support the opposing party's position." *Id.* (internal quotations omitted). Thus, when a defendant seeks judgment as a matter of law, the controlling question is whether the plaintiff has arguably proven a legally sufficient claim.

In making that determination, "[w]e do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for that of the jury." *Pizza Hut v. Lockard*, 162 F.3d 1062, 1068 (10th Cir. 1998) (quotations and

citations omitted). Instead, we view "the facts and all reasonable inferences from them . . . in the light most favorable to the appellant." *Phillips*, 244 F.3d at 796. Accordingly, although the parties set forth varying versions of the underlying facts, we consider those facts in the light most favorable to Dr. Turnbull.

II

Topeka State Hospital was a state-run inpatient mental health center[1] which treated patients with severe mental illnesses for whom outpatient treatment options had failed. TSH was not a jail. Patients were treated in the least restrictive environment possible, although all patients had been admitted because they posed some danger to themselves or others. While the hospital had an obligation to admit anyone referred there, unusually violent offenders could be transferred to more secure facilities.

Cynthia Turnbull, a Ph.D. psychologist, came to TSH in 1993. She was hired to start a group therapy program for the adolescent treatment unit and to conduct individual and group therapy with adolescent male inpatients. One treatment issue that arose regularly was the "sexual acting out" displayed by many of the patients. TSH staff were aware this posed potential dangers, dangers that were tragically highlighted when a female employee was murdered by a patient in 1992. Dr. Turnbull recognized the risks of her job, and the hospital required that she regularly review and sign a job description that included mention of the risk of assault by patients. The hospital's general approach toward sexual acting out by patients, however, was that it was a clinical issue to be addressed in the patient's treatment program. The sexual harassment training that was required for each new staff member made no mention of how to respond to sexual harassment by patients.

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[1] The hospital closed in 1997.

Chronic understaffing at the hospital meant female staff often felt unsafe. While the hospital had several policies directed at the safety of staff members, Dr. Turnbull and others complained these measures were not always effective. For example, TSH staff received training in managing assertive or unruly patients, but the training focused on appropriate ways to calm the patient rather than self-defense to protect the staff member. Although psychologists could request extra staff to attend a group therapy session or other treatment, the shortage of staff meant those requests were rarely met. The hospital purchased personal alarms known as "screechers" after the 1992 murder, but they had fallen out of use by the time Dr. Turnbull started work and she was never told of their availability. Dr. Turnbull testified about her safety concerns before an Executive Committee meeting in 1995, but she alleges the meeting minutes were later "sanitized" to remove all mention of her concerns. The Executive Committee did note in 1996 that another group of staff was expressing a "reality based fear" of conditions on the ward.

Other than her testimony to the Executive Committee, Dr. Turnbull made no formal reports of her safety concerns. She describes several conversations about safety with her supervisors in the psychology department. Both warned her not to send memoranda or file incident reports because her career would be hurt if the administration began to view her as a troublemaker.

The safety concerns were exacerbated for the psychologists because of a lack of adequate treatment facilities on the adolescent unit. There were no treatment rooms within that unit, and the one treatment room with a one-way mirror for visual monitoring was on an isolated floor in a separate building. During renovations on the adolescent unit, Dr. Turnbull requested that the hospital construct a treatment room with a large window in order to provide a safe place to conduct therapy, but no such room was provided. Dr.

Turnbull met with female patients and smaller male patients in her office, but she was uncomfortable meeting with larger males in the small, enclosed space. The only other options within the unit were public spaces that provided little protection for confidential conversation, and tiny seclusion rooms whose only furniture was a mattress on the floor. In pleasant weather, Dr. Turnbull and the other psychologists frequently solved the space dilemma by walking with patients around the hospital grounds as they spoke.

A patient named James Stout came into this environment in June 1996. Mr. Stout had sexually assaulted two female staff members at another state hospital prior to his transfer, but that fact was not communicated to TSH. His diagnosis on admission was "oppositional defiant disorder," a relatively mild diagnosis for a psychiatric inpatient but one characterized by a tendency toward aggression and difficulty submitting to authority. Dr. Turnbull performed his intake evaluation and noted he had trouble respecting personal boundaries when agitated. Although she did not believe his reports of past rapes and of voices telling him to "kiss" and "feel" somebody, she noted in his file that staff should not meet him alone in small, enclosed areas.

Despite these early warnings and one period when Mr. Stout was restrained for aggression, his therapy proceeded well, and by August he was allowed the privilege of field trips off the hospital grounds. He had several therapy sessions with Dr. Turnbull and was never sexually inappropriate toward her. On August 26, the weather was fine and many people were outside enjoying the day, so they headed outside to walk the grounds during their therapy session. When they reached a slightly secluded area, he suddenly attacked. He knocked her to the ground, undressed her and digitally penetrated her, bit and choked her, and repeatedly threatened to kill her. Dr. Turnbull suffered post-traumatic stress disorder after the assault and never returned to the hospital.

In addition to filing criminal charges against James Stout, Dr. Turnbull sued TSH and the State of Kansas under Title VII for allowing a sexually hostile work environment to exist at the hospital. At trial, the jury heard almost seven days of evidence. TSH made a Rule 50 motion for judgment as a matter of law at the close of plaintiff's evidence and again at the close of its own, arguing Dr. Turnbull had not proven a legally sufficient hostile work environment claim. The court took each motion under advisement, and the jury began its deliberations.

The jury was asked to determine two issues: whether a sexually hostile work environment existed at TSH and, if so, whether the hospital or state should be held legally responsible. After two half-days of deliberation, the jury reported it was unable to reach a unanimous decision on the second question and felt further deliberation would be fruitless. The court revisited defendants' Rule 50 motions at that time, holding without discussion that the evidence had not shown a cognizable claim of gender based sexual harassment and dismissing the case.

III

"Sexual harassment is actionable under a hostile work environment theory when the harassing conduct is 'sufficiently severe or pervasive to alter the conditions [of the victim's] employment and create an abusive working environment.'" *Lockard*, 162 F.3d at 1071, quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). There is no "mathematically precise test" for determining whether the conduct is sufficiently severe or pervasive. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). Some factors to be weighed include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. Because frequency is merely one factor in the analysis, an isolated incident may suffice if the conduct is severe and

threatening. *See, e.g., Lockard*, 162 F.3d at 1072 (allowing claim based on single incident); *Smith v. NW Fin. Acceptance Corp.*, 129 F.3d 1408, 1413 (conduct must be "sufficiently pervasive *or* sufficiently severe"). The harassing conduct must be "both objectively and subjectively abusive." *Lockard*, 162 F.3d at 1071.

Here, the jury found Dr. Turnbull was subjected to a sexually hostile work environment. *See* R. at 1458. We easily conclude that determination was not unreasonable. While there was only one incident,[2] it was objectively abusive, dangerous, and humiliating, and Dr. Turnbull was so traumatized she was unable to return to work thereafter. TSH argues any dangers inherent in the hospital environment could not constitute sexual harassment because the male staff members were also subject to sexual comments or physical attack by patients. However, conduct that affects both sexes may constitute sexual harassment if it disproportionately

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[2] Title VII provides that an employee must file a complaint with the Equal Employment Opportunity Commission within three hundred days of the acts about which she complains. *See* 42 U.S.C. § 2000e-5(e). Counting back three hundred days from the date Dr. Turnbull filed her complaint yields a date of July 19, 1996, approximately five weeks before her attack. Accordingly, TSH argues any events that took place before that date are time barred and must not be considered. In response, Dr. Turnbull argues the environment that existed throughout her employment constituted *continuing* sexual harassment and should be considered as a whole. *See Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1414-16 (10th Cir. 1993) (discussing continuing course of conduct for sexual harassment under Title VII).

It is undisputed that the attack itself took place within the statutory time period. Because the attack itself is sufficient to support a claim for sexual harassment and Dr. Turnbull does not specify other incidents as bases for her claim, we treat the attack as a single incident of harassment. However, we examine other events in the record to determine the general environment at the hospital, whether TSH was on notice of employee sexual harassment concerns, and whether the hospital took reasonable measures to ensure the safety of its employees.

affects female staff. *See Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111 (8th Cir. 1997) (assaults on female staff sexual harassment even though patient also assaulted male staff member). The male staff of TSH were not subject to the fear or the reality of sexual assault in the same manner as the female staff. We turn, therefore, to the more difficult question of whether TSH should be legally liable for the harassment.

We have held that an employer may be responsible for sexual harassment based upon the acts of nonemployees. *Lockard*, 162 F.3d at 1073 (restaurant responsible for acts of customers); *see also Crist*, 122 F.3d at 1108 (group home liable for acts of mentally incapacitated resident); 29 C.F.R. § 1604.11(e) (employer may be responsible for acts of non-employee where employer "knows or should have known of the conduct and fails to take immediate and appropriate corrective action"). To protect against imposing strict liability upon employers, we apply a negligence analysis, asking whether the organization "fail[ed] to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known." *Lockard*, 162 F.3d at 1074, *citing Hirschfeld v New Mexico Corrections Dept.*, 916 F.2d 572, 577 (10th Cir. 1990); 29 C.F.R. § 1604.11(e) (employer liable if "fails to take immediate and appropriate corrective action"). The focus is not on the conduct itself but on the employer's behavior in response; a hospital cannot control every act of its patients, but it does control the environment at large. *Crist*, 122 F.3d at 1110-12.

The negligence analysis can be divided into two separate inquiries, looking "first, into the employer's actual or constructive knowledge of harassment, and second, into the adequacy of the employer's remedial and preventative responses." *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 673 (10th Cir. 1998). With regard to knowledge, a plaintiff may prove actual knowledge based on her reports of harassment to management-level employees or constructive knowledge

based on the pervasiveness of the sexual hostility within the working environment. *Id.* While Dr. Turnbull made no complaints about James Stout in particular prior to the attack, she spoke about general safety concerns with her supervisors on multiple occasions, even bringing those concerns to the hospital's Executive Committee. Trial testimony established that the atmosphere of sexual hostility at the hospital was pervasive. Indeed, part of TSH's defense is that the dangers were so obvious that employees knowingly assumed those risks through their continued employment. A reasonable juror could conclude that TSH had either actual or constructive knowledge of the risk of sexual assault by patients.

The final question, whether TSH responded appropriately to the known dangers on the adolescent unit, is the real crux of this case. We have established no bright-line rule for measuring the "appropriateness" of an employer's response, asking instead whether the response was reasonable under the circumstances. *Id.* at 675-76. Key factors in that determination are the promptness and effectiveness of any action. *Id.* at 676. It is not always possible for an employer to completely eliminate offensive behavior, and thus the effectiveness inquiry looks not to whether offensive behavior actually ceased but to whether the "remedial and preventative action was reasonably calculated to end the harassment." *Id.* We also consider "the appellants' expectations given their choice of employment." *Crist*, 122 F.3d at 1111. In an environment like TSH it would be impossible to eliminate all potential risk; instead, we ask whether the hospital took reasonable measures to alleviate known or obvious risks.

TSH contends that "[i]n an environment like TSH, where the patients were

. . . a danger to themselves or others, employees like plaintiff inherently assume the risk of facing sexually hostile, aggressive patients." Aplee. Br. at 50. In support of this theory, it cites cases which held prisons were not liable for sexual harassment or sexual assaults by an inmate. *See, e.g.,*

Powell v. Morris, 37 F.Supp.2d 1011 (S.D. Ohio 1999); *Hicks v. Alabama*, 45 F.Supp.2d 921 (S.D. Ala. 1998). This argument overlooks the continued emphasis on the employer's preventive measures, however. As explained in one case, "Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, ***as long as the defendant institution took proper preventative and remedial steps*** with regard to inmate behavior." *Powell*, 37 F.Supp.2d at 1017 (emphasis added); ***see also Hicks***, 45 F.Supp.2d at 933 (prison not liable where plaintiffs could identify no extra measures that could have prevented incident). Even in an inherently dangerous working environment, the focus remains on whether the employer took reasonable measures to make the workplace as safe as possible.

It is undisputed that TSH took some measures to ensure the safety of its staff. Nevertheless, Dr. Turnbull contends the hospital could have, and should have, done much more. More staff would have made the wards safer, as would treatment rooms in visible areas. The hospital could have provided self-defense training and better informed staff how to respond if sexually harassed by a patient. Although screechers were technically available, TSH could have ensured they were given to each staff member and kept in working order. Because the jury was divided on the issue of TSH's liability, we can deduce that one or more jurors believed the hospital's preventative measures were inadequate. We can not say that determination would be unreasonable as a matter of law on this record. Applying all reasonable inferences in favor of Dr. Turnbull, we conclude she presented sufficient evidence to support a claim of sexually hostile work environment against TSH. Accordingly, we hold that the grant of judgment for TSH as a matter of law was improper.

We **REVERSE** the district court's judgment in favor of TSH and **REMAND** for a new trial.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CYNTHIA TURNBULL,
Plaintiff-Appellant,
v. No. 00-3086
TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,
Defendants-Appellees.

ORDER
Filed August 10, 2001

Before **TACHA,** Chief Judge, **SEYMOUR** and **BRORBY,** Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active services as required by Fed.R.App.P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered by the Court
PATRICK FISHER, Clerk of the Court
by: /s/_____
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CYNTHIA TURNBULL,
Plaintiff,

v. Civil No. 98-2222-GTV

TOPEKA STATE HOSPITAL and
THE STATE OF KANSAS,
Defendants.

AMENDED JUDGMENT IN A CIVIL CASE

This action came on for trial before the court an a jury, and the issue were duly tried. The jury was unable to reach a unanimous agreement upon a verdict. The court then rendered its decision on defendants' motion for judgment as a matter of law which the court had taken under advisement.

IT IS ORDERED AND ADJUDGED that plaintiff to take nothing and the action is dismissed on the merits, and that the defendants Topeka State Hospital and the State of Kansas to recover from plaintiff Cynthia Turnbull their costs of action.
Dated: February 28, 2000

RALPH L. DeLOACH, CLERK
by: /s/
Michelle Union, Deputy Clerk
ENTERED ON THE DOCKET DATE: 3/1/00

Transcript of Trial, p. 1381 line 14 to p. 1382 line 8:

THE COURT: Is there any member of the jury who does not concur with what Miss Waggoner has just said? Is there any of you who feels that further deliberations would bear fruit? None appearing.

Well, in that case, I'm going to determine that the jury is deadlocked and unable to come to an agreement and you are then discharged from any further consideration of the case.

Now I have two motions for judgment as a matter of law under advisement that were filed by the defendants in the case and the motions will be granted. The court determines that the jury—a jury is not able to come to an agreement and then—but I determine on my own that the evidence has failed to establish a submissible claim of gender based sexual harassment. And so the Rule 50 motions are granted. Case is dismissed.

Transcript of Trial, p. 676 lines 1 to 22:

Q. And then what happened?
A. And he was removed from the grounds and later convicted?
Q. Did James Stout ever return back to the hospital?
A. No.
Q. That was the last day, August 27, 1996 that he was at the hospital?
A. I believe so, yes.
Q. What time of day was it that this assault took place?
A. It was approximately eleven a.m.
Q. And during that time you were in the security building next to the adolescent unit?
A. Yes.
Q. Had you been informed by Dr. Turnbull that she was taking James Stout on a walk on the grounds?
A. No.
Q. Had you been asked to provide an escort?
A. No.
Q. Were you available to provide an escort if so requested?
A. Yes.